Supreme Court, U.S.
FILED
MAY 25 2000
CLERK

(3)

No. 99-1650

In the

Supreme Court of the United States

MARSHALL SPIEGEL,

Petitioner,

-versus-

DETECTIVE JOSEPH CORTESE,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

REPLY BRIEF

DAVID C. THOMAS
Counsel of Record
565 West Adams Street
Suite 600
Chicago, Illinois 60661-3691
(312) 906-5050
Attorney for Petitioner

Curry & Taylor 202-393-4141/Washington D.C. 20005

13PP

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

ARGUMENT 1

CONCLUSION 9

APPENDIX

TABLE OF AUTHORITIES

CASES

FRAZELL V. FLANIGAN, 102 F.3D 877, 886 (7TH CIR. 1996).. 6

GRAHAM V. CONNOR, 490 U.S. 386, 109 S. CT. 1865 (1989) 2

ILLINOIS V. GATES, 462 U.S. 213, 103 S. CT. 2317 (1983)... 6

MAHONEY V. KESCRY, 976 F.2D 1054, 1058-59 (7TH CIR. 1992)..... 2, 6

MAXWELL V. CITY OF INDIANAPOLIS, 998 F.2D 431, 435-36 (7TH CIR. 1993)..... 7

MOORE V. THE MARKETPLACE RESTAURANT, 754 F.2D 1336, 1357 (7TH CIR. 1985)..... 7

ORNELAS V. UNITED STATES, 517 U.S. 690 (1996) 1, 7, 8

SNYDER V. TREPAGNIER, 142 F.3D 791 (5TH CIR. 1998) 1

Respondent's panicky Brief in Opposition, submitted though none was required, argues that:

1. Based upon Ornelas v. United States, 517 U.S. 690 (1996), the Court of Appeals "properly refused to defer to the jury's determination on probable cause when assessing the defense of qualified immunity";[1]

2. In any event, the Court of Appeals was justified in not deferring to the jury's verdict in favor of Petitioner on the probable cause issue because it supposedly "did not question petitioners's account of the underlying historical facts"; [2] and

3. The cases upon which Petitioner relies, including Snyder v. Trepagnier, 142 F.3d 791 (5th Cir. 1998), cert. dismissed, 119 S. Co. 1493 (1999), are distinguishable "because those cases involved disputes of underlying historical fact that had been resolved by the trier of fact adversely to the defendant."[3]

As set forth more fully below, Respondent's argument is based upon a false premise. The case at bar most certainly did involve at the trial level disputes of fact which were resolved by the jury adversely to Respondent. The Court of Appeals simply replaced that resolution with its own contrary determination when it found that the Respondent was entitled to qualified immunity based upon the existence of probable cause, after the jury had found that there was no probable cause. Finally, Ornelas is a criminal case involving a judge's findings on a motion to suppress, and therefore has little or no relevance to a determination of qualified immunity in a

---

[1]Brief in Opposition and 11.

[2]Id. at 12.

[3]Id.

civil rights case involving a jury verdict directly opposed to the grant of qualified immunity.

1.APPLYING A STANDARD OF OBJECTIVE REASONABLENESS, THE JURY DECIDED NUMEROUS FACTUAL DISPUTES IN FAVOR OF PETITIONER AND AGAINST RESPONDENT, AND BASED UPON THOSE DECISIONS FOUND THAT THE ARREST WAS NOT SUPPORTED BY PROBABLE CAUSE.

There is no dispute that the jury in the case at bar applied a standard of objective reasonableness in deciding the probable cause issue. See Petition at 8, n. 5. See also, Graham v. Connor, 490 U.S. 386, 109 S. Ct. 1865 (1989) (Fourth Amendment "reasonableness" measured by objective standard). Therefore, in returning its verdict the jury necessarily decided that an objectively reasonable police officer would not have believed that Petitioner's arrest was supported by probable cause. See, eg., Mahoney v. Kescry, 976 F.2d 1054, 1058-59 (7th Cir. 1992).

In reaching this conclusion, viewing the evidence in the light most favorable to Petitioner, the jury rejected the notion that Cherny's statement to Respondent, that Cherny had been struck by a man 37 years his junior, was sufficient to establish probable cause. The jury also rejected Respondent's contention that the bruise Cherny displayed provided adequate justification. Nor, according to the jury, was Cherny's account of his escalating conflict with Petitioner a sufficient basis. The jury considered these contentions by Respondent alone and in combination, and found them wanting.

The district court's Memorandum Opinion and Order denying Respondent's motion for summary judgement, included in the Appendix to the Petition at 39a-73a, documents additional factual disputes that the jury resolved

in Petitioner's favor. For example, Respondent denied that he had reason to question the allegations of Cherny and Bobin on the ground that they harbored animosity toward Petitioner because, according to Respondent, the evidence did not establish that Cherny and Bobin had such animosity. (App. 50a). Again, looking at the evidence in the light most favorable to Petitioner, the jury obviously found that Cherny and Bobin did harbor such animosity toward Petitioner.
Another example is found in Respondent's argument that the evidence did not establish that Cherny and Bobin filed their police report and criminal charges in retaliation for Petitioner having filed his police report and criminal charges against them. (App. 52a). The jury found that the actions of Cherny and Bobin were retaliatory.

There are many others, but these examples amply demonstrate that Respondent is dead wrong when he argues to this Court that the case at bar does not involve disputes of historical fact which were resolved by the jury adversely to Respondent.[4] (Brief in Opposition at 12).

---

[4]Perhaps the source of the error is that Respondent's present counsel did not try the case, as Petitioner's counsel did. Not having actually tried the case results in basic gaps in Respondent's counsel's knowledge of the facts. For example, Respondent's Brief repeats a factual error contained in the Seventh Circuit's opinion: both state that Petitioner was acquitted in state court of the criminal charge against him "after a trial by jury." (Brief in Opposition at 6). This is simply not true: Petitioner was acquitted after a bench trial. (See Supplemental Appendix attached to this Reply). Such a fundamental ignorance of the facts renders suspect Respondent's assertions concerning the underlying facts of the case.

2. IN GRANTING QUALIFIED IMMUNITY, THE COURT OF APPEALS IGNORED THE JURY'S VERDICT, AND SIMPLY SUBSTITUTED ITS OWN VIEW OF THE FACTS BY DECIDING THAT THE ARREST WAS SUPPORTED BY PROBABLE CAUSE.

Respondent concedes throughout his Brief in Opposition that the Court of Appeals did not in any fashion defer to the jury's verdict. (Brief in Opposition at 9, 11).

In fact, the Court of Appeals ignored the jury's verdict and substituted its own view of the facts to conclude that the arrest was supported by probable cause. The Court of Appeals, which of course did not hear any evidence, nevertheless held, directly contrary to the jury's verdict, that:

> Cherny's statement to Cortese that he had been struck by a man 37 years his junior, the bruise he displayed and his account of the escalating conflict with Spiegel together provided ample grounds for Cortese to believe that Spiegel had committed a battery.

(App. 11a). Not a word is mentioned about the jury's verdict.

Further proof that, contrary to Respondent's assertion in his Brief, the Court of Appeals did "question" the jury's findings regarding the historical facts is contained in the passage in its opinion where "these purported facts" are dismissed as "either irrelevant... or insignificant..." (App. 12a). The problem with the Court's opinion is that the jury, which viewed each of the witnesses to the incident, found the facts to be established and not merely "purported," and also found them to be relevant and significant. The Court of Appeals simply usurped the role of the jury.

When there has been a jury verdict resolving disputed facts, as in the case at bar, the scope of de novo review is limited to determining whether the verdict is sufficient as a matter of law. See, eg., F.R.Civ. P.50. It is axiomatic that in this context a court must view the evidence in the light most favorable to the party obtaining the verdict. And that verdict may not be disturbed unless the court finds that no reasonable jury could have reached that conclusion. The Court of Appeals in the case at bar did neither of these. Petitioner in reality received two trials in this case. One was in the district court before a jury, which was proper and which Petitioner won. The second was in the appellate court before three judges, which was improper. De novo appellate review does not ever properly involve a new trial.

II. RESPONDENT'S BRIEF ONLY SERVES TO HIGHLIGHT THE CONFLICT EXISTING AMONG THE CIRCUITS REGARDING THE PROPER STANDARD FOR DETERMINING QUALIFIED IMMUNITY IN THE FOURTH AMENDMENT CONTEXT, WHEN THERE IS NO DISPUTE THAT THE LAW IS CLEARLY ESTABLISHED AND A JURY HAS ALREADY DETERMINED THAT THE DEFENDANT'S ACTIONS WERE OBJECTIVELY UNREASONABLE.

Having demonstrated that the jury in the case at bar did resolve historical facts underlying the issue of qualified immunity adversely to Respondent, and that the Court of Appeals acted directly contrary to that verdict in granting qualified immunity, we arrive at the pivotal issue of what is the proper standard for determining qualified immunity in the Fourth Amendment context when there is no dispute that the law is clearly established.[5]

---

5 "It is undisputed that the constitutional right to be free from

The better view, the one adopted by the majority of the cases as cited in the Petition, is that the court is "bound by the jury's resolution of disputed factual issues in assessing [the defendant's] immunity defense." Frazell v. Flanigan, 102 F.3d 877, 886 (7th Cir. 1996).

> Yet in addition to that, a number of circuits have indicated that a jury's finding on the Fourth Amendment question effectively resolves the immunity issue as well, because both questions turn on whether the officer's conduct was objectively reasonable under the circumstances. Those circuits reason that once a jury has determined under the Fourth Amendment that the officer's conduct was objectively unreasonable, that conclusion necessarily resolves for immunity purposes whether a reasonable officer could have believed that his conduct was lawful.

Id. at 886-87[6]

This view is also succinctly stated by the Seventh Circuit in Mahoney v. Kescry, supra, 976 F.2d at 1058-59:

> If the issue of the adequacy of the grounds for the arrest is the same in the immunity inquiry and on the merits of the false-arrest charge, then unless some legal rule or standard bearing on probable cause has changed since

---

arrest without probable cause was clearly established at the time Spiegel was arrested in 1993." (App. 10a).

[6] reasonable mistakes is built into the concept of "probable cause." Illinois v. Gates, 462 U.S. 213, 103 S. CT. 2317 (1983).

> the arrest, the jury's determination that there was or was not probable cause will automatically resolve both immunity and the merits.

(Emphasis added).

See also, Moore v. The Marketplace Restaurant, 754 F.2d 1336, 1357 (7th Cir. 1985) (Posner, J., concurring) (qualified immunity depends on whether police had probable cause to arrest); Maxwell v. City of Indianapolis, 998 F.2d 431, 435-36 (7th Cir. 1993) (question of probable cause in unlawful arrest cases is indistinguishable from the qualified immunity issue); Petition at 13-18 (collecting cases from other Circuits).

Respondent, in his last stand, claims that these cases are rendered obsolete by this Court's decision in Ornelas. It is telling that Respondent cannot point to any authority involving civil rights cases and/or qualified immunity defenses.[7] Instead, he desperately seeks to transform a criminal case, involving a judge's finding in the context of a motion to suppress, into relevant precedent.

Ornelas is limited to criminal cases in its facts, its text, and its rationale. This Court held that after a hearing on a motion to suppress, independent appellate review of a trial judge's "ultimate determinations of reasonable suspicion and probable cause is consistent with the position we have taken in past cases." Ornelas v. United States, supra, 517 U.S. at 697. Each of the cases cited is a criminal case involving a motion to suppress. This Court then held that a trial court's "ultimate determinations" in ruling upon a motion to suppress are to be reviewed on appeal de novo.

---

[7]Ornelas for the qualified immunity propositions that Respondent advances

Nor, despite Respondent's best efforts, does the rationale underlying Ornelas translate into the civil rights area. It makes sense that "appellate courts are to maintain control of, and to clarify, the legal principles" regarding probable cause in criminal cases where that is the precise issue. It does not make sense that civil rights cases would be the medium to do so, where the issue is not probable cause per se but that of qualified immunity. Far from playing a "particularly important role" in developing the legal principles regarding probable cause, qualified immunity bears at best only tangential relevance because it involves other issues (for example, whether the law was clearly established), and probable cause is only one component.

Even if Ornelas were applicable to qualified immunity determinations in civil rights cases, that would not help Respondent in the case at bar. Ornelas clearly holds that "findings of historical fact" are reviewed "only for clear error." Id. at 699. As noted above, the Court of Appeals did not do that in the case at bar. Nor did the Court give "due weight" to the jury's findings regarding the credibility of witnesses and the inferences to be drawn from those findings. Id. at 700.

The fact that Ornelas is not applicable is confirmed by the action of this Court on January 15, 1999, long after Ornelas was decided, in granting the petition for certiorari in Snyder v. Trepagnier, No. 98 507, on the following question: whether a jury finding that a fourth amendment constitutional violation occurred by use of excessive force in an arrest necessarily precludes a finding of qualified immunity? This is exactly the same question posed in the case at bar.[8] By

[8]Respondent's argument that the cases are distinguishable because Snyder "involved an excessive - force claim rather than a probable-cause claim "betrays a fundamental lack of understanding of this issue. Both excessive force and probable cause are fourth amendment violations which are judged by a standard of objective reasonableness. Therefore, for purposes of the question presented, it makes absolutely no difference

granting the petition in Synder, this Court recognized the importance of the question to the development of civil rights law and existence of the conflict. The conflict still exists, the question is still important and recurring, and the need for this Court's guidance is even greater now than it was last year.

The case at bar presents the identical question upon which this Court granted certiorari in Snyder. The question retains its significance because it is a recurring one and the Courts of Appeal have been unable to agree on a uniform approach to it. Therefore, the Petition should be granted to address this important civil rights issue and provide the necessary guidance to the lower courts.

Respectfully submitted,

Attorney for Petitioner
MARSHALL SPIEGEL
DAVID C. THOMAS
565 West Adams Street
Suite 600
Chicago, IL 60661-3691
(312) 906-5050

---

which fourth amendment claim is involved.

THE CLERK: Marshall Spiegel.
MR. TUITT: Judge, Pat Tuitt on behalf of Mr. Spiegel. We were and still are ready for trial.
MR. SEIDNER: We are ready to proceed. And this will be a bench trial, Judge.
THE COURT: Get all of the witnesses up here so we can swear them in.
(Witnesses duly sworn.)
THE COURT: Mr. Spiegel, your are waiving your right to a jury trial?
MR. SPIEGEL: Yes, I am, on the advice of Counsel.
THE COURT: Do you know what a jury is?
MR. Spiegel: Yes.
MR. TUITT: The Defendant has signed a jury waiver.
TE Court: All right. The Jury Waiver. The plea is not guilty.